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ABSTRACT

The appropriateness of proposed Standard 405(e), which stipulates employment conditions of full-time clinical (law) faculty members, is considered. This proposal of the Accreditation Committee of the Association of American Law Schools (AALS) would establish job security, economic equality, and a governance voice for clinicians who are not expected to engage in scholarship. The AALS Clinical Committee favors the proposal in view of the relationship of job security to the quality of clinical legal education, the need to make clinical teaching a satisfying long-term career, and the need for academic freedom protection for clinicians. However, a different view, held by the AALS president, is that resolution of issues not directly related to academic freedom (job status, governance, and economic issues) is suitable for determination by individual law schools, and that another arrangement would be totally alien to a reasonable division of authority between the law schools and the American Bar Association. It is suggested that the proposed standard might move some schools to insist on scholarship from all clinicians, which could result in displacing some good clinical teachers. Voluntary review of the status of full-time nonscholar clinicians by schools is advocated. (SW)

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the President's Address

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Status of Clinicians Proposed Standard 405(e)

David H. Vernon

(Prepared for delivery to the House of Representatives of the Association of American Law Schools on January 6, 1983, Cincinnati, Ohio.)

As you know, the Standards Review Committee of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association is considering a proposal from the ABA Accreditation Committee to amend the accreditation standards to require as a condition precedent to accreditation, both new and continuing, that "(f)ull-time clinical faculty members shall be entitled to an employment relationship substantially equivalent to that required for other members of the faculty . . . ."

While on its face, the proposal may be read simply as a mandated job security system for clinicians, the legislative history makes it relatively clear that the proposed Standard also contemplates substantial equivalency in both governance and economic matters. The formal interpretation proposed by the ABA Accreditation Committee, after indicating that the Standard may be satisfied by including clinicians on the normal tenure track, on a separate tenure track, or under various long-term contractual arrangements, goes on to say:

> The approach chosen also shall include terms and conditions of employment substantially equivalent to those offered to non-clinical, full-time members of the faculty.

The substantial equivalency of the terms and conditions of employment language, while not wholly clear, seems to call for such things as substantially equivalent salaries, retirement programs, health insurance, sick and sabbatical leaves, and, perhaps, nine month contracts, as well as mandating the same or equivalent voice in governance. Because full-time clinicians who are expected to engage in scholarship come within the current ABA definition of a faculty member, the proposed Standard will have no impact on them. Thus, 405(e) is directed solely at establishing job security, economic equality, and a governance voice for clinicians who are not expected to engage in scholarship.

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Because the Executive Committee of the Association of American Law Schools is in the process of developing a response to Proposed Standard 405(e), because the questions raised are of substantial importance to law schools, and because less than a consensus exists within the law school community, it seems appropriate to devote a substantial amount of time to an airing of views about the appropriateness of the proposed Standard. Since the Executive Committee has not yet taken a position on the issue, the views I express obviously are my own.

As an Association, the immediate issue presented concerns the position AALS, through its Executive Committee, should take concerning the proposal that the ABA Council on Legal Education assert its accreditation power to mandate that law schools provide job security, substantial economic equality, and a governance voice to non-scholar clinicians. The position one takes on the appropriateness of the proposed standard is not necessarily related to the position one would take as an individual member being asked to consider the status of such clinicians at his or her own school. For myself, I strongly oppose the proposed ABA Standard while equally strongly supporting at my own school a job security system for at least some non-scholar clinicians we may employ.

Two members of the Executive Committee -- Joe Harbaugh and I -- prepared discussion drafts for the Committee's consideration. Both drafts, which expressed opposition to the Standard although for different reasons, were referred for review and comment to the AALS Committee on Clinical Legal Education. The Clinical Committee disagreed with the two drafts and expressed support for the proposed Standard. All three of the documents are in your hands.

The points made by the AALS Clinical Committee are important and deserve our close attention. I will present a brief outline of four of the Committee's arguments:

> First, the Committee urged that since the ABA Standards currently mandate job security and a governance voice for all full-time faculty members -- all who are tenured or on tenure track -- it is not a departure from tradition for the ABA to mandate job security and a governance voice for full-time law teachers. Indeed, the Committee said that it would amount to selective regulation -- which I take to mean unreasonable discrimination -- if the ABA failed to mandate job security and a voice in governance for the only law teachers now excluded -- clinicians who are not expected to engage in scholarship.
>
> Another point made by the Clinical Committee was that uncertainty as to job security necessarily has an adverse affect on the quality of clinical programs. It urged that a system that requires law schools to grant full-time clinicians who are not expected to engage in scholarship the opportunity to earn tenure or some other form of job security will make it possible for law schools to attract and retain higher quality clinical teachers by establishing and reinforcing a sense that clinical teaching can be a rewarding and satisfying long-term career; and will provide protection of academic freedom necessary to encourage clinical teachers to experiment with ways to improve the students' clinical experiences and to select cases for their educational value without fear of sanctions being imposed because the cases are controversial.
>
> The Clinical Committee of AALS went on to argue that clinicians who have no interest in scholarship contribute substantially to the teaching programs of their law schools and that they should be granted some form of job security, although the Committee recognized that tenure as such may be inappropriate.
>
> Finally, the Clinical Committee urged that governance issues await a case-by-case resolution in recognition of the fact that for many schools the governance issues -- such as voting rights -- are far more difficult than the job security portion of the proposed Standard.

The Clinical Committee makes a strong case for its position. While I agree with much of what it said about the relationship of job security to the quality of clinical legal education, about the need to make clinical teaching a satisfying long-term career, and about the need for academic freedom protection for clinicians, I do not agree with its conclusion that proposed ABA Standard 405(e) is the appropriate way to accomplish these goals.

Under current ABA regulations, accredited law schools must provide faculty members -- defined by the ABA as persons who devote substantially full time to teaching and scholarship -- with a major voice in governance and with an opportunity to earn tenure. Schools cannot remain accredited and abandon either. Thus, the AALS Clinical Committee is correct in pointing out that the ABA currently requires job security and a governance voice for law teachers who are expected to engage in scholarship. The issue is whether law schools should be forced to provide similar rights to persons who are not expected to engage in scholarship.

One of the questions raised by the position taken by the AALS Clinical Committee is whether the expectation of scholarship is a reasonable basis of classification for tenure eligibility and participation in governance. I cannot accept the Clinical Committee's conclusion that the failure to adopt 405(e) or its equivalent would amount to selective regulation, or would amount in essence to a denial of equal protection. The current ABA regulation does not mandate that persons who teach full-time without being expected to engage in scholarship be excluded from the tenure track or a voice in governance. It leaves that decision to each institution. Each institution is free within the very broad definition of faculty member currently used by the ABA to determine for itself those who are tenure eligible, and who among those who teach but are not expected to engage in scholarship are to have a voice in governance. If it wishes to do so, a law school may include within the tenure-eligible governing group teachers who are not expected to engage in scholarship, whether they be clinicians or legal writing instructors. In addition to being free to determine tenure eligibility and governance issues, individual institutions currently are free to establish their own personnel policies -- to design such things as job security systems other than tenure for persons who teach but are not expected to engage in scholarship, to decide who is eligible for sabbatical leave, and to fix appropriate salaries that take into account teaching alone or both teaching and scholarship. The proposed Standard leaves almost no flexibility to the schools except in designing job security systems other than tenure for clinicians who are not expected to engage in scholarship. It imposes a rigid system on the schools in almost all other phases of personnel policy.

In allocating powers between the ABA and individual law schools, the ABA, within a very broad range, has left status, governance and economic issues to individual schools. Adoption of proposed Standard 405(e), in fact, would be a marked departure from the traditional relationship between the ABA and the law schools. In essence, the proposed Standard would force a new and detailed definition of "faculty member" on the law schools, would change the existing ABA definition of faculty members as persons engaged substantially full-time in teaching and scholarship, and itself would amount to selective regulation on behalf of a single group within the law school community -- clinicians who are not expected to engage in scholarship. For me, the distinction now drawn by ABA standards between teacher-scholars on the one hand and the teacher not expected to engage in scholarship on the other, seems wholly reasonable and, indeed, applies neutrally and non-discriminatorily to all law teachers, whether clinicians or not, who engage in both teaching and scholarship.

While my personal view is that law school governance should remain in the hands of those who undertake both teaching and scholarship, others obviously believe that governance should be more broadly based. In some schools, the latter group will outvote the former. In others, the reverse will be true. Each institution currently is free to decide that issue for itself within the very broad definition of teacher-scholar. My own very strong preference is that all full-time teachers, whatever their teaching assignments, be expected to engage in both teaching and scholarship. In fact, many schools, my own included, staff at least part of their clinical programs with persons who, while excellent clinicians, are not expected to engage in scholarship. As long as staffing and governance decisions are made within the

individual institution, faculty members, even though disagreeing with the result, would have little difficulty accepting it. If it were forced on me from the outside, I, as a faculty member, certainly would resent it and would resist it to the fullest possible extent; and I would expect that most of my colleagues, whatever their views on the governance and staffing issues would join me in resisting any outside imposition of internal staffing decisions. I believe they would recognize that their academic freedom was being invaded, and that educational policy-making was being taken from their hands by persons from outside of the institution. Further, I am confident that most universities would be vigorous in resisting the imposition from the outside of governance and staffing decisions so central to the institutions' academic enterprise.

Having educational decisions forced on individual institutions by persons from outside is far different from institutional decisions being made by internal processes after full consultation within the institution. Institutions and their faculty members continually engage in consultative decision-making, and are able to accept and live with the ultimate decision, whether they initially supported it or opposed it. It is quite another thing to have a resolution of disputed educational issues forced on institutions and their law schools from the outside. I suggest that the current federalism, with the ABA establishing very broad guidelines and the individual school exercising substantial discretion in their staffing and personnel decisions, has much to commend it. There is little enough educational diversity within the law school world with the current system. To move to control such sensitive matters as governance, tenure, and economic rights of law teachers has little to commend it, and much to condemn it.

The current status of clinicians may present a serious academic freedom issue. Over the years, law school autonomy has given way to the overriding need to protect the academic freedom of law teachers. Existing ABA and AALS regulations well may provide the necessary protection for clinicians. If not, both organizations should take steps to assure the availability of academic freedom protections necessary for the educational integrity of clinical programs. For the reasons noted by the AALS Committee on Clinical Legal Education, the traditional protection of academic freedom required by both AALS and ABA should extend to non-scholar clinicians to the same extent it does to their colleagues who are expected to engage in scholarship. If current standards do not provide that protection they should be changed to accomplish that purpose.

Resolution of issues not directly related to academic freedom, however, -- job status, governance and economic issues -- is peculiarly suited for determination by individual law schools. Any other system would be totally alien to a reasonable division of authority between the law schools and the ABA.

It would be fair to say that I am asserting a territorial imperative. I view the proposed standard as invading what is now and should remain law school territory, and am sufficiently offended to resist the invasion to the full extent possible. Proposed Standard 405(e) is not the first recent attempt to invade what traditionally has been left to individual law schools. I wish it were the first. Over the past few years, however, there have been several efforts by persons from outside the law school world to dictate curricular policy to the schools. The Chief Justice of the United States Supreme Court has been a leader of indirect efforts to control law school curricula. Some members of the ABA Council on Legal Education -- so far not a majority -- have attempted to use the ABA's accreditation authority to assert direct control over curricular matters which traditionally have been left to individual law schools. Those seeking to impose their will on us apparently have come to believe that we in the law school world are unfit or incapable of managing our own affairs. I find myself wearying of the constant need to be on the defensive, to fight off attacks. The expression of lack of confidence implicit in proposed Standard 405(e) hits a particularly sensitive nerve in that it dictates the qualifications of those who are to determine the educational policies of individual law schools, a matter I would insist is uniquely one for individual institutions to determine.

I would hope that the law schools somehow can persuade those in the bench and bar who believe us to be unfit to govern ourselves that the law schools not only are capable of self governance, but that they do it rather well. My year as President of AALS will be spent trying to persuade the bench and bar to work with us to improve legal education rather than attempting to impose solutions on us. On the positive side, I will be working with persons whose primary interest is in the improvement of legal education. With that joint goal motivating all involved, progress can be made. I am not wholly sanguine, however. For example, the interim recommendation of the ABA Task Force on Professional Competence, published in October of 1982, that clinical teaching should be equated with scholarship in making tenure decisions is not one that gives me confidence in the success of my venture. Too many "should" standards have been seen as potential "must" standards by too many people.

Going beyond the territorial imperative, I oppose the proposed Standard because I view it as causing substantially more mischief than it possibly can remedy. Leaving aside for the moment the argument that the issues raised in the proposal are not appropriate matters for ABA Council action, and for the sake of argument conceding that they may be, I would urge that the proposal is premature, coming as it does at a time when the law schools are in the process of working out their own solutions. Further, it has the potential of being severely divisive within individual schools and within the law school world generally.

In the discussion draft I prepared for the Executive Committee, I noted the possibility that 405(e) might have a severe and adverse impact, educational and fiscal, on law school programs generally, and on clinical programs in particular. In short compass, it may move some schools to insist on scholarship from all clinicians and, thus, displace some good clinical teachers now on the scene. In fiscal terms, schools that move to requiring scholarship of all teachers either will be forced to expand their clinic staffs to provide research time for the clinician-scholars, or they will have to reduce their clinic programs to provide research time. Neither solution is very palatable. My report to the Committee, which you have in hand, expands on the two points made, and I will not discuss them further.

I would emphasize another point made in that document, however. A consensus now exists that teacher-scholar clinicians appropriately are on the same tenure track as their colleagues who teach more traditional courses. (As noted earlier, proposed Standard 405(e) would have no impact on the scholar-clinician.) No similar consensus has developed about the status of other clinicians. For the law schools, the existence of full-time teachers who are not expected to engage in scholarship is quite novel, having come into being over the last 10 to 12 years. At a minimum, the schools should be given a chance to work out their own solutions before the ABA moves to impose a mandate on them. Progress is being made. The very fact that 405(e) has been proposed and is being given serious consideration is likely to have the salutary effect of encouraging schools with full-time non-scholar clinicians on their staffs to give serious consideration to their status. In that sense, the proposal will have accomplished at least part of what its proponents sought. The voluntary guidelines proposed by the joint ABA-AALS Committee on Guidelines on Legal Education have been before us for a relatively short time. In my view, both the ABA Council and the Executive Committee of the AALS should act jointly in urging law schools to give serious consideration to the Joint Committee's proposals relating to the status of full-time non-tenure track personnel working in law school clinics. I urge, however, that the voluntary guidelines remain voluntary and that the Council reject the proposal of its Accreditation Committee to convert the voluntary guidelines to a mandatory condition precedent to accreditation.

David H. Vernon
President, Association of American Law Schools

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